MOTION FILED
FEB 6 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,

Appellee,

On Appeal from the Supreme Court the State of Vermont

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Committee on State Taxation of the Council of State Chambers of Commerce

GEORGE S. KOCH
Counsel
499 South Capital Street, SW
Suite 412
Washington, DC 20003

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of the State of Vermont

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The Committee on State Taxation of the Council of State Chambers of Commerce hereby respectfully moves for leave to file the attached brief *amicus cruiae* in this case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee was requested and refused.

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 33 Chambers of Commerce (29 state and 4 regional Chambers). The Committee on State Taxation (COST), one of three advisory committees of the COUNCIL, consists of 136 corporate members which conduct a substantial portion of the interstate and international business of the United States. One of COST's principal activities has been to work with the states and others toward developing fair and equitable national standards in the income allocation and apportionment aspects of state taxation.

Member companies of COST are thus representative of that part of the nation's business sector which is most directly affected by state taxation of interstate and international business operations. COST is therefore vitally interested in cases such as this one which present issues significantly affecting the uniformity, certainty and fair apportionment of state and local taxes.

The particular interest of COST in this case is that it presents the following substantial question:

> Whether the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States was violated when Vermont levied its income tax on dividends received by Mobil Oil Corporation ("Mobil"), a New York corporation with a New York commercial domicile, where:
>
> (1) the dividends were received and their control, use and disposition were managed and directed, and the capital stocks on which the dividends were paid were held, managed and controlled, by Mobil from its New York offices;

> (2) most of the dividends were derived from foreign source earnings of payor corporations; and
>
> (3) the only connection between Mobil and Vermont was the sale of a small percentage of its products in that state.

The United States Supreme Court has never decided the pure legal question of whether a state can impose an income tax on foreign source* dividends (i) received by a corporation which is organized elsewhere and which has its commercial domicile elsewhere; (ii) from stocks held, managed and controlled elsewhere; and (iii) which are received, controlled, managed, used and disposed of elsewhere ("Unrelated Foreign Dividends").

The issue in the case at hand is not burdened by factual problems. The record shows that Mobil was engaged in interstate and foreign commerce during the years involved. In the United States its principal business was the exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products. In Vermont its only activity was the wholesale and retail marketing of a small percentage of its pertoleum products and related products. Mobil was subject to net income taxes or franchise taxes measured by net income imposed by Vermont, approximately 40 other states and the District of Columbia.

---

* Most of the dividends at issue are from foreign sources. Since the inconsistent state taxation of foreign source dividends is so important to United States corporation, this motion and brief will concentrate on the foreign aspects of the disputed assessment.

Mobil owned the capital stocks of a large number of United States and foreign corporations. Dividend income was the major source of its Federal taxable income. The record shows that in all respects Mobil's activity as the owner of the stocks was conducted, managed and directed at its offices outside Vermont. All dividends were received there and Mobil's control and use of the dividends were managed and directed there.

More than 99% of the dividends at issue were from sources outside the United States. The amounts of disputed Unrelated Foreign Dividends are approximately $174,000,000 for 1970, $282,000,000 for 1971 and $280,000,000 for 1972.* Vermont is attempting to tax an apportionable share of these Unrelated Foreign Dividends without even taking the payors' property, sales and payroll into account for an equitable apportionment.

It is our understanding that hundreds of state income tax cases are pending on the dockets of state courts and administrative tribunals throughout the country. The principal issue in many of those cases is whether the taxing state can tax Unrelated Foreign Dividends of a corporation domiciled in another state.

Establishment by this Court of Constitutional standards for fair taxation of such dividends is urgently needed. It is needed to unclog those dockets. It is needed to prevent inequity. It is needed to maintain a fair system of taxation throughout the nation in this era of rapidly increasing state and local revenue demands.

---

* See Exhibit 8 of the record.

By this motion COST seeks leave (1) to show that the decision of the Supreme Court of Vermont is contrary to the rule of fair taxation, as developed by the Court under the Due Process and Commerce Clauses of the Constitution, and (2) to show the national and detrimental effect that the decision will have, unless the Court undertakes to resolve the conflict between the fair apportionment standard and the increasing efforts of state tax collectors to maximize tax revenue from multistate businesses by taxing extraterritorial Unrelated Foreign Dividends.

COST therefore urges that leave be granted to file a brief as *amicus curiae* and respectfully so moves the Court.

Respectfully submitted,

GEORGE S. KOCH
Counsel
499 South Capitol Street, SW
Suite 412
Washington, D.C. 20003

Attorney for the Committee on State Taxation of the Council of State Chambers of Commerce

February, 1979

INDEX

Page

INTRODUCTORY STATEMENT 1

OPINIONS BELOW 2

INTEREST OF AMICUS CURIAE 2

Argument

A) The Need for Constitutional Standards 2

B) Unrelated Foreign Dividends 10

CONCLUSION 16

CITATIONS

CASES:

Austin v. *New Hampshire*, 420 U.S. 656, 666 (1975) 14

Chestnut Securities Co. v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir. 1942) 12

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 14

Connecticut General Life Insurance Co. v. *Johnson*, 303 U.S. 77 (1938) 11

Curry v. *McCanless*, 307 U.S. 357 (1939) 12

Fargo v. *Hart*, 193 U.S. 490, 499-500 (1904) ... 12

First Bank Stock Corp. v. *Minnesota*, 301 U.S. 234 (1937) 12

Page

General Motors Corp. v. *Washington*, 377 U. S. 436 (1964) 14

General Trading Co. v. *State Tax Commission*, 322 U.S. 335 (1944) 14

Hans Rees' Sons, Inc. v. *North Carolina*, 283 U.S. 123, 134 (1931) 10

International Harvester Co. v. *Department of Treasury*, 322 U.S. 340 (1944) 14

International Harvester Co. v. *Evatt*, 329 U.S. 416 (1947) 14

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) 14

McLeod v. *Dilworth Co.*, 322 U.S. 327, 349, 358 (1944) 14

Moorman Manufacturing Co. v. *Bair*, 98 S. CT. 2340 (1978) 7

Nashville, C & St. L. R. Co. v. *Browning*, 310 U.S. 362, 365 (1940) 12

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753, 756 (1967) 10

Norfolk & Western R. Co. v. *Missouri*, 390 U.S. 317, 325 (1968) 10, 12

Northwestern States Portland Cement co. v. *Minnesota*, 358 U.S. 450 (1959) 2, 14

Pembina Consolidated Silver Mining and Milling Co. v. *Pennsylvania*, 125 U.S. 181 (1888) 11

Underwood Typewriter Co. v. *Chamberlain, 254 U.S. 113 (1920)* *11*

Page

Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250, 256 (1938) 14

Wheeling Steel Corp. v. *Fox*, 298 U.S. 193 (1936) 12

MISCELLANEOUS:

Carlson, "State Taxation of Corporate Income from Foreign Sources", *Essays in International* Taxation; 1976, Department of the Treasury, Washington, D.C. (1976), pages 284-301 3

Garrison, "Toward A Consensus on Apportionable v. Allocable Income", *28 The Tax Executive 41* (October, 1975) 3

House of Representatives Special Subcommittee on State Taxation of Interstate Commerce, Vol, I, June 15, 1964, pages 598-599 8

Pierce, *35 Taxe—The Tax Magazine*, 749 (1957) 5

U.S. Constitution

Commerce Clause 8, 10, 13

Due Process Clause 10, 11

Fourteenth Amendment 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,
Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,
Appellee.

On Appeal from the Supreme Court of Vermont

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

I. INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Jurisdictional Statement in the above-captioned case.

II. OPINIONS BELOW

Findings of fact and conclusions of law by the Commissioner of Taxes of the State of Vermont are found in the Commissioner's unreported Determination of Appeal, dated April 11, 1974, which is set forth in Appendix A of Appellant's Jurisdictional Statement. An opinion of the Washington County Superior Court reversing the Commissioner's determination and holding in favor of the appellant is contained in that court's unreported January 6, 1977 order and its unreported June 9, 1977 final order, which are set forth in Appendix B of Appellant's Jurisdictional Statement. The decision from which the appeal was taken is the order of the Vermont Supreme Court reversing the decision of the Superior Court. The order and Opinion of the Vermont Supreme Court, which have not yet been reported, are set forth in Appendix C of Appellant's Jurisdictional Statement.

III. INTEREST OF AMICUS CURIAE

The interest of the Committee on State Taxation of the Council of State Chambers of Commerce is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

IV. ARGUMENT

A. The Need for Constitutional Standards

It has been twenty years since this Court issued its famous precedent on the Constitutional limits on a state's power to tax the income of an out-of-state corporation doing business within the state and admittedly subject to its taxing jurisdiction in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). During that twenty-year period the inconsistent taxation of Unrelated Foreign Dividends has emerged as one of the most pressing problems in the state income tax area.

The problem is serious and growing. For example, 1972 corporate income tax returns reported foreign source dividends in excess of $2,700,000,000.00 (Carlson, "State Taxation of Corporate Income for Foreign Sources," *Essays in International Taxation*; 1976, Department of the Treasury, Washington, DC, (1976), pages 284-301). The current number is probably much higher. This multi-billion dollar number is the amount in dispute year after year in most of our states.

Cases often "appear" to turn on the factual question of whether disputed dividends are "business" income or "unitary" in nature. In the end, the central question is really the issue involved in the case at bar—do states have the the right to include Unrelated Foreign Dividends in the apportionable base?

Dividends on investments have traditionally been allocated for purposes of state corporate income taxation to the state where the recipient has its corporate domicile.

The background of this historical method of taxing dividends and the current attempt to change that method by zealous tax collectors were summarized in Garrison, "Toward a Consensus on Apportionable v. Allocable Income", 28 *The Tax Executive* 41 (October, 1975), as follows (footnotes omitted):

> "The problem of dividing the total net income of a multistate firm among the states entitled to impose a tax on it has existed ever since Wisconsin enacted the first modern state net income tax

in 1911. For all those years this problem has been the subject of study and comment.

* * *

The National Tax Association has wrestled with the problem of allocation and apportionment for more than a half century. As early as 1922, an NTA committee recommended specific allocation of interest, dividends, rents, and royalties to their geographic source. Their report declared: 'They form no part of the trading profit and do not need to be apportioned by formula since they can readily be specifically allocated to their proper sources'.

In 1957, the National Conference of Commissioners on Uniform Laws adopted the Uniform Division of Income for Tax Purposes Act (commonly referred to as UDITPA), which has since been enacted by over half the states. Under UDITPA, non-business income is allocated, item by item, to each appropriate state according to the situs of the item. All of the remaining income is then labeled business income and is apportioned, according to a three-factor formula, among the states with jurisdiction to tax such income.

Business income is defined in UDITPA as income arising from transactions and activity in the regular course of the taxpayer's trade or business, including income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

The classes of income which are to be specifically allocated under UDITPA, if they do not constitute business income for the taxpayer, are dividends, interest, rents and royalties, and capital gains.

At the time UDITPA was adopted, the statutes and administrative practices for most of the states required direct allocation to specific states of dividends, royalties, and interest income especially where such income had not arisen in the main course of the taxpayer's trade or business. There was a rather extensive body of case law and literature in support of this traditional legal position. The framers of UDITPA were aware of these precedents and practices but, as indicated by Sections 4 through 8 of the Act, they evidently preferred to make no radical departure from existing law and administrative practices with respect to allocation and apportionment.

Professor William J. Pierce, the principal draftsman of the Uniform Act (UDITPA), has indicated that the distinction between business and nonbusiness income in the act was intended to codify the existing pattern of legislation. In an article in 35 *Taxes—The Tax Magazine* 749 (1957), Professor Pierce stated:

> 'Sections 4 through 8 of the act provide for the allocation of four types of non-business income to specific states, rather than apportionment on the basis of a formula. The reason for this treatment, which is representative of the existing pattern of legislation, is that it is felt that these items of income can appropriately be attributed to a specific state.'

* * *

The push for full apportionment of all income by formula perhaps had its origin in 1966 with the so-called Interstate Taxation Bill (H.R. 11798, 89th Cong., 2d Sess.), which was introduced in Congress soon after the publication of the Willis committee report. Under this so-called Willis bill, the entire income, both business and

nonbusiness, had to be divided among the states by a uniform apportionment formula. This radical departure from the prevailing practice with respect to allocation was one of the most controversial parts of the Willis bill.

The momentum for Congressional legislation starting with the Willis bill caused the formation in 1967 of the Multistate Tax Compact, a confederation of 21 states created primarily for the purpose of blocking the enactment of any federal legislation with respect to the interstate tax problem. Article IV of the Compact adopts the Uniform Act (UDITPA) as its rules governing allocation and apportionment. However, the Multistate Tax Commission, which is created under the Compact, adopted regulations in 1971 requiring virtual full apportionment of all income, irrespective of the class of income or its geographic source. Sections 4 through 8 of the Uniform Act (UDITPA) were simply read out of the statute by regulation. The Commission's regulations instead reflect the view that all of a corporation's interstate taxable income is business income and should, therefore, be apportioned.

Most of our states and the District of Columbia now impose corporate taxes measured by net income which includes dividends in some manner. (See Appendix F of the Appellant's Jurisdictional Statement) Only three exclude foreign source dividends. Seven states "allocate" dividends (*i.e.*, the state taxes 100% of the dividends if it is the recipient corporation's commercial domicile state and it taxes none of the dividends if it is not the commercial domicile state). Eighteen states (*e.g.*, the UDITPA states) and the District of Columbia supposedly follow the same rule of allocation to commercial domicile if dividends are "nonbusiness" income. However, as advocates of the

Multistate Tax Commission creed that "*all* income is business income",* tax administrators in many of these states automatically classify all dividends as "business" income and attempt to have them apportioned even though the taxpayer's commercial domicile is elsewhere. Eight states apportion all dividends under their formulas, regardless of the location of the taxpayer's commercial domicile. Four states apply various hybrid methods of taxing dividends. It is thus apparent that virtually all corporations engaged in interstate and foreign commerce are subject to risks of multiple state taxation of their Unrelated Foreign Dividends.

This Court is well aware of the inconsistent tax treatment afforded dividends by the various states. In *Moorman Manufacturing Co.* v. *Bair*, 98 S. Ct. 2340 (1978), the Court observed in footnote 15:

> "one State in which a corporation does business may consider a particular type of income business income and simply include it in its apportionment formula; a second State may deem that same income nonbusiness income and attribute it to itself as the 'commercial domicile' of the company; and a third State, though also considering it nonbusiness income, may attribute it to itself as the 'legal domicile' of the company."

The *Moorman* Opinion stated that although this Court is aware that the "potential for attribution of the same income to more than one State is plain", it

* At its May 4, 1977 Annual Meeting, the Multistate Tax Commission adopted a Resolution which provides that "it is the policy of the Multistate Tax Commission * * * that each state which imposes a tax on or measured by corporate income seek * * * to apply formulary apportionment to all income * * *".

believed that the prevention of duplicative taxation requires national uniform rules for the division of income—rules that can be enacted because of the legislative power granted to Congress by the Commerce Clause. In refusing to grant the Moorman Manufacturing Company relief, this Court advised that "It is to that body, and not this Court, that the Constitution has committed such policy decisions".

COST agrees that Congress should enact fair national uniform rules for the division of income and COST appreciates this Court's continued urging of Congress to legislate in this area. However, after many years of following legislative attempts to adopt such rules, it has been our experience that rapid Congressional action in this area cannot be expected. In 1964, after three years of intensive study and hearings by the House of Representatives Special Subcommittee on State Taxation of Interstate Commerce, the Subcommittee stated in Volume 1 of its June 15, 1964 Report (at pp. 598 and 599):

> "Today the businessman is placed on the horns of a dilemma. He may file returns wherever due and precisely as due, at costs which would often completely overshadow the amount of tax involved. Or he may live under the threat of litigation, back liabilities, interest, and penalties. The resulting situation is as unsatisfactory for the tax administrator as it is for business.
>
> Nor does the future hold out any prospect of improvement. The number of income tax jurisdictions increases. Laws seem to become more complex rather than less. Improved enforcement procedures may add taxpayers to the rolls, but still it is inconceivable that they can make any substantial impact on much of the noncompliance which has been observed in this report. To the extent that such an enforcement effort does produce literal compliance, it can only result in accentuating the inequities which now permeate the system. Looked at in terms of its operation today, or its potential problems tomorrow, the impact of the State and local income tax system on interstate commerce gives cause for serious concern.
>
> Fifty years ago, as the first of the States adopted the income tax, forward-looking tax men warned of the dangers of each State taxing interstate commerce in its own way. For 50 years, state tax administrators have been discussing ways of achieving simplicity and uniformity. One proposal after another has been formulated, discussed, revised, and in spite of the expenditure of enormous efforts, discarded. And, today, the States appear to be as far from a solution as they have ever been. In short, the history of 50 years of State income taxation leaves no room for optimism that the States will be any more successful in the future than they have been in the past."

It is now fifteen years later and there is less room for optimism for a legislative solution today than there was in 1964. It is therefore evident that the business community's problem of non-domicile states attempting to tax Unrelated Foreign Dividends will continue to confront this Court, state courts and administrative tribunals until the outer limits of state taxing power in this area are established by this Court.

COST believes that the time has come for this Court to resolve this problem and establish a Constitutional standard for business and tax administrators. Sixty-five years of disputing the question of whether a nondomicile state can tax Unrelated Foreign Dividends is far too long.

The Mobil case presents a timely opportunity for this Court to consider the application of the Due Process Clause and the Commerce Clause to this question. The legal issue is not burdened by factual problems. COST therefore strongly urges the Court to accept this opportunity.

Our specific views on the two issues in the instant case are as follows:

B. Unrelated Foreign Dividends

1. The Due Process Clause

The role of the Due Process Clause in state income tax controversies was explained in *Moorman* as follows:

> "The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 756. This requirement was plainly satisfied here. Second, the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing state'. *Norfolk & Western R. Co.* v. *Missouri*, 390 U.S. 317, 325."

The second restriction is the one pertinent to the case at hand. If the Unrelated Foreign Dividends are not rationally related to values connected with Vermont, the dividends cannot be taxed because of the long-standing Constitutional doctrine that a state cannot tax income which is "in no just sense attributable to transactions within its jurisdiction". *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 134

(1931). See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920).

The Fourteenth Amendment to the Constitution provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." As corporations are "persons" within the meaning of the Fourteenth Amendment (*Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, 125 U.S. 181 (1888)), it follows that states cannot compel corporations to pay taxes without due process.

In *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77 (1938), where California was prevented from imposing its gross premium tax on a Connecticut corporation's non-unitary, non-California reinsurance contracts, Justice Stone discussed the applicability of the Due Process Clause to state tax matters as follows:

> "[T]he limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But *the due process clause denies to the state power to tax or regulate the corporations's property and activities elsewhere.*" (Emphasis added; 303 U.S. at 80-81.)

Norfolk & Western R. Co. v. *Missouri State Tax Commission*, 390 U.S. 317, 325 (1968), reaffirmed this Court's prohibition against extraterritorial taxation when it stated:

> "The Taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders'. *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U.S. 362, 365 (1940). Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. *Fargo* v. *Hart*, 193 U.S. 490, 499-500 (1904)." (Footnotes omitted.)

The Constitutional rule which determines the situs of Unrelated Foreign Dividends is "*mobilia sequuntur personam*" (*i.e.*, movables follow the person). They are "localized at the owner's domicile for purposes of taxation" since they do not have a "business situs" in another state. *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193 (1936); *First Bank Stock Corp.* v. *Minnesota*, 301 U.S. 234 (1937); *Curry* v. *McCanless*, 307 U.S. 357 (1939); *Chestnut Securities Co.* v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir. 1942), *cert. denied*, 316 U.S. 668 (1942).

COST respectfully submits that the *mobilia* standard should be applied herein to prevent Vermont from projecting its taxing power beyond its borders to tax the Unrelated Foreign Dividends.

2. The Commerce Clause

The applicability of the Commerce Clause to cases of this nature was explained by Justice Powell in his dissent in *Moorman* as follows (citations and footnotes are omitted):

> "It is a basic principle of Commerce Clause jurisprudence that '[n]either the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of the residents'.* * * Those barriers would consititute' an unreasonable clog upon the mobility of commerce'.* * *
>
> One form of such unreasonable restrictions is 'discriminating State legislation'.* * * This Court consistently has struck down state and local taxes which unjustifiably benefit local businesses at the expense of out-of-state businesses. ***
>
> This ban applies not only to state levies that by their terms are limited to products of out-of-state business, or which explicitly tax out-of-state sellers at higher rates than local sellers. It also reaches those taxes that 'in their practical operation work discriminatorily against interstate commerce to impose upon it a burden, either in fact *or by the very threat of its incidence*'." (Emphasis added.)

The principle that a tax is not Constitutionally permissible when the very *threat* of its incidence works discriminatorily against interstate commerce is the heart of this Court's long-standing Multiple Taxation Doctrine, *i.e.*, that state taxes cannot subject interstate or foreign commerce to a *risk* of multiple taxa-

tion not borne by intrastate commerce. *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (1944); *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947). The "risk" element is predicated upon the *power* of another state to tax the interstate or foreign income, even if that power is not exercised. See *Western Live Stock* v. *Bureau of Revenue, supra*, 303 U.S. at 256, and Mr. Justice Rutledge's single opinion in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 349, at 358 (1944); *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335 (1944); *International Harvester Co.* v. *Department of Treasury, supra*; and *Austin* v. *New Hampshire*, 420 U.S. 656, 666 (1975).

When the target of multiple taxation is Unrelated Foreign Dividends, the importance of the Multiple Taxation Doctrine is elevated to its highest level because of the continual national policy of avoiding multiple taxation of foreign source earnings (See the Revenue Acts of 1918, 1921, 1924 and 1926, Sec. 222 and 238; the Revenue Acts of 1928, 1932, 1934, 1936 and 1938, IRC of 1939, Sec. 131; and Secs. 901-904 of the IRC of 1954).

The Vermont Supreme Court stated in the opinion below that it believes that the Multiple Taxation Doctrine has been replaced by a requirement of *actual* multiple taxation. The Vermont court cites *Moorman*, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), and *Northwestern States Portland and Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959).

While the majority Opinion in *Moorman* does state in footnote 11 that "Since there is no evidence in the record regarding the percentages of its total net income taxed in the other States in which it did business during those years, any claim that appellant was taxed on more than 100% of its total net income would also be speculative", COST believes that the continued existence or nonexistence of the Multiple Taxation Doctrine—at least with respect to Unrelated Foreign Dividends—is so important that it should be the subject of analysis and briefing by the parties to this case. The Doctrine has been a significant factor in business planning for more than forty years. It should not be overruled by a footnote's implication.

For this reason alone, COST believes that this case should be the vehicle for the Court's clarification of the present status of the Multiple Taxation Doctrine.

CONCLUSION

For all of the foregoing reasons, COST urges this Court to note probable jurisdiction in the present case and give plenary consideration to the Due Process Clause and Commerce Clause questions discussed in Appellant's Jurisdictional Statement.

Respectfully Submitted.

GEORGE S. KOCH
Counsel
499 South Capitol Street, SW
Suite 412
Washington, DC 20003

Attorney for the Committee on State Taxation of the Council of State Chambers of Commerce

February, 1979